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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

AKILI HESHIMU WILLIAMS,

Defendant and Appellant.

2d Crim. No. B199699
(Super. Ct. No. BA283891)
(Los Angeles County)

Akili Heshimu Williams appeals the judgment entered after a jury convicted him on two counts each of attempted willful, deliberate, premeditated murder (Pen. Code, §§ 664/187, subd. (a));¹ assault with a firearm (§ 245, subd. (a)(2)); and shooting from a motor vehicle (§ 12034, subd. (c)). The jury also found true allegations (1) that all of the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)); (2) that a principal was armed with a firearm in commission of the attempted murders and assaults (§ 12022, subd. (a)(1)); and (3) that a principal personally used a firearm in committing the attempted murders and shooting from a motor vehicle (§ 12022.53, subds. (b)-(e)). Appellant admitted prior strike and prison term allegations as to all counts (§§ 667, subds. (b)-(i), 667.5, subd. (b), 1170.12, subds. (a)-(d)). As to the attempted murder counts, he also admitted suffering a prior conviction

¹ All further undesignated statutory references are to the Penal Code.

of a serious felony within the meaning of section 667, subdivision (a)(1). The trial court sentenced him to 50 years to life plus one year in state prison, consisting of 25 years to life on the primary attempted murder count doubled for the strike prior plus one year for the prior prison term enhancement allegation. Sentencing on the remaining counts and enhancement allegations were either ordered to run concurrent or were stayed pursuant to section 654. Appellant contends the court abused its discretion in failing to appoint substitute counsel to file a motion for new trial based on ineffective assistance of counsel. We affirm.

FACTS

Prosecution

At approximately 3:30 p.m. on May 19, 2005, "Eight-Trey Gangster Crip" members Derrick Boston and Joe Nash committed a drive-by shooting of a residence in South Los Angeles known to be frequented by members of a rival gang, the "Rollin 60's Crips." At about 6:05 p.m. that evening, Boston was standing at the corner of 74th Street and Denker with fellow gang members Willie Richard, Deonta Douglas, and Torrie Williams when two Black males with braided hair and white T-shirts drove by in a white Acura with no license plates. One of the occupants of the Acura yelled "Fuck Eight-Treys, you all got to move." Less than a minute later, the Acura returned and the front seat passenger leaned out and fired several shots at the group, hitting Boston and Richard.

At about 6:10 p.m., Los Angeles Police Officer Guillermo Mixer was on route to another "shots fired" call with his partner when he saw two Black men with braided hair in a white Acura on Florence Avenue. Both men were looking at another police vehicle in front of them and appeared to be nervous.

Shortly thereafter, Officer Martinez and his partner Officer Garcia were patrolling in the area when they received a radio broadcast stating that two Black men in a white Acura without license plates had just been involved in a drive-by shooting at 74th and Denker. The officers were driving southbound on Van Ness Avenue near 70th Street when they saw two Black men with braided hair and white T-shirts in a white Acura with

no license plates. As the officers were following the Acura, the driver, later identified as appellant, abruptly pulled over. The passenger, who had his hands around his waistband as if he were holding something, got out and ran into a nearby building. The officers activated their emergency lights and siren and began pursuing the Acura, which stopped at a nearby intersection. Appellant got out of the vehicle and said, "I don't have nothing" as he lifted his shirt. Appellant initially complied with the officers' command to lie on the ground, then got up and ran away. After a brief chase, he was apprehended.

Later that evening, Torrie Williams and Deonta Douglas identified the Acura as the vehicle involved in the drive-by shooting. Torrie subsequently identified appellant as the driver at an in-field showup. The same night, Officer Mixer saw appellant in custody and identified him as the individual he had seen driving westbound on Florence. The officer also identified Brown as the passenger from photographs. Appellant had previously admitted to the police that he was a member of the Rollin 60's Crips gang and that his moniker was "Chico." Brown was also an admitted member of the gang.

On May 20, 2005, Los Angeles Police Detective Jeff Martin went to California Hospital to speak with Richard. When Richard was shown a six-pack photographic lineup, he identified appellant as the driver of the vehicle involved in the shooting and said his face was "clear as daylight." Richard also identified Brown in another six-pack as the passenger who shot at him. At trial, Richard recanted both identifications and claimed he had not been shown any photographs. A few weeks before trial, Richard told Detective Martin he was being pressured by members of the Eight-Trey Gangster Crips to not testify. Richard also asked for "paperwork" proving he did not testify.

It was subsequently determined that appellant was the owner of the Acura involved in the shooting, and Brown's cell phone was found on the front passenger seat. There was also a backpack inside the car with a Santa Monica College emblem and photographs depicting Rollin 60's Crips gang members Oscar Ward, Anthony Mitchell,

Damion Reed, and Timarus Greeno. Photographs of Rollin 60's Crips gang members were also found in a search of appellant's home.

Los Angeles Police Officer David Ross testified as a gang expert. The nature of appellant's prior contacts with police, the contents of a letter found in his bedroom, and the markings on his school materials all led Officer Ross to believe that appellant was a member of the Rollin 60's Crips gang. Gang members do not snitch on each other, even if they are from different gangs. A gang member who testified against a rival gang member in court would suffer consequences from his own gang. Officer Ross concluded that the shooting in this case was committed for the benefit of the Rollin 60's Crips in that it was payback for the earlier shooting of one of its members.

Defense

On May 19, 2005, Quincy Jones III, a movie and music producer, was in the area of Fifth Street and Florence supervising interviews for a documentary about inner city life. Jones testified that appellant and Brown were at the location of the filming, and that he was talking to both men at 6:05 p.m. Monte Kelly testified that Brown and appellant were still there when he left shortly before 6:00 p.m.

Gayle Davis-Culp, an English professor at Santa Monica College, testified that appellant had attended her 9:30 a.m. class on May 19, 2005. Appellant was supposed to submit a paper that day, but Davis-Culp gave him until the following morning to turn it in. Appellant never returned.

DISCUSSION

Appellant contends the trial court violated his Sixth Amendment right to counsel by failing to appoint substitute counsel to litigate a new trial motion alleging that his trial attorney provided ineffective assistance of counsel. We disagree.

Background

Prior to sentencing, appellant's trial attorney, Anthony Garcia, moved for a new trial alleging, among other things, that a new alibi witness had been discovered. At the hearing on the motion, Garcia stated that appellant also had "a question with regard to

counsel." Appellant explained that his concern related "to things I asked him to do." The court responded that appellant's concern "sounds like" a *Marsden*² request, and suggested that the new trial motion be heard first. Appellant agreed.

In arguing the new trial motion, Garcia stated that he had only recently learned about purported alibi witness Audrey Barnes.³ Appellant acknowledged he did not tell Garcia about Barnes "until after I did research and found the grounds for retrial." At the conclusion of the hearing, the court denied the motion on its finding that the evidence regarding Barnes was not newly discovered because appellant knew about her.

The court then asked the prosecutor to step outside so that appellant could "be heard further on essentially what's a *Marsden* motion." Appellant then argued that Garcia had provided ineffective assistance by (1) misadvising him about testifying on his own behalf; (2) failing to call Bonita Grant, Oscar Ward, and a librarian as alibi witnesses; (3) failing to call gang and forensic experts; (4) presenting a deficient *Pitchess*⁴ motion; (5) requesting a continuance; and (6) notifying the prosecutor about a prospective juror that appellant wanted to remain on the jury. Garcia responded that appellant had decided not to testify upon his advisement. He also stated that he decided not to call Ward after consulting with appellant because he would have been unable to provide appellant with a sufficient alibi and was a known gang member. Garcia also located a librarian whom appellant identified as a potential alibi witness, but she had no recollection of appellant and in any event would have been unable to vouch for his whereabouts at the time the crime occurred. Garcia did not believe he had related any information to the prosecutor about the juror appellant had referred to, and noted that he would have been obligated to notify the court if appellant knew the juror.

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ Barnes submitted a declaration stating that appellant was at her apartment working on a term paper at 6:00 p.m. on the day of the shooting. Barnes also stated that appellant had visited her downstairs neighbor Bonita Grant right before he came to her apartment.

⁴ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

The court found that appellant would not have benefitted from a gang or forensics expert, and rejected appellant's claim that he had suffered prejudice as a result of the continuance that Garcia obtained. The court also found that appellant fully understood his right to testify and had knowingly decided against doing so. Accordingly, the court denied the motion.

Analysis

When a defendant makes a postconviction *Marsden* motion alleging that he is entitled to a new trial on the ground of ineffective assistance of counsel, the trial court must conduct a hearing to determine whether to appoint substitute counsel to prepare and present a new trial motion on the defendant's behalf. "' . . . If the claim of inadequacy relates to courtroom events that the trial court observed, the court will generally be able to resolve the new trial motion without appointing new counsel for the defendant. [Citation.] If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a "colorable claim" of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 346.) Substitute counsel should be appointed only when the court, in the exercise of its discretion, finds the defendant has shown that failing to replace his attorney would substantially impair his constitutional right to assistance of counsel. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) The court's decision to deny substitute counsel shall not be disturbed on appeal absent a clear abuse of discretion. (*Ibid.*)

The court did not abuse its discretion in refusing to appoint substitute counsel.⁵ Appellant's argument to the contrary is largely based on a standard that was

⁵ We reject the People's assertion that appellant forfeited his request for substitute counsel by failing to make the request below. The record reflects that the court construed appellant's concerns regarding counsel as a postconviction *Marsden* motion, and counsel expressly urged the court to treat it as one. *People v. Gay* (1990) 221 Cal.App.3d 1065, 1070-1071, in which neither the defendant nor his attorney requested substitute counsel, is therefore inapposite.

overruled by our Supreme Court. Specifically, in *People v. Stewart* (1985) 171 Cal.App.3d 388, the Court of Appeal held that a defendant bringing a postconviction *Marsden* motion alleging ineffective assistance of counsel need only establish "the possibility that his trial counsel failed to perform with reasonable competence and that, as a result, a determination more favorable to the defendant *might* have resulted in the absence of counsel's failings." (At p. 396.) The Supreme Court expressly disapproved of this language and held that postconviction *Marsden* motions alleging ineffective assistance are not subject to a lesser standard of proof. (*People v. Smith, supra*, 6 Cal.4th at p. 694.) Regardless of when the motion is brought, the defendant must demonstrate that the denial of substitute counsel would substantially impair his Sixth Amendment rights. (*Id.*, at p. 696.)

Appellant made no such showing. He made no colorable claim that his trial attorney provided ineffective assistance by failing to call or investigate any witnesses, much less that the court abused its discretion in concluding that it was unnecessary to appoint an attorney to argue the claim on appellant's behalf. It is undisputed that Garcia was not aware of Barnes until after trial, and that appellant never asked him to call her as a witness. As soon as appellant told Garcia about Barnes, he interviewed her and included her declaration in a motion for new trial.

The record is also devoid of any evidence undermining Garcia's explanations regarding his tactical reasons for not calling Ward and Grant. Ward was apparently unable to provide appellant with an alibi for the time of the shooting, and Grant's proffered testimony that appellant was with her at 6:00 p.m. would have undermined Jones's testimony that appellant was with him at the same time at a different location.⁶ Moreover, the librarian appellant claimed could provide him an alibi stated

⁶ In his reply brief, appellant asserts that Jones's testimony was subject to impeachment because he admitted on cross-examination that appellant could have left the film shoot at any time between 5:00 p.m. and 7:00 p.m. The record actually reflects that Jones merely acknowledged he may have told an investigator that appellant left between 5:00 and 5:30 p.m. Jones also testified that he had reconstructed his schedule for the day

that she had no recollection of appellant and that any interaction with him would have occurred earlier on the day in question. Appellant also fails to make a colorable claim that the result of the proceedings would have been different had Garcia sought appointment of gang and forensic experts, or that the continuance counsel sought resulted in a denial of his right to a speedy trial.

Appellant also fails to make a colorable claim that Garcia misadvised him regarding his right to testify. To the extent there was a credibility question between appellant and his attorney on this issue, the court could reasonably accept counsel's version of the facts. (*People v. Smith, supra*, 6 Cal.4th at p. 696.) It was also proper for the court to accept Garcia's representation that he had not conferred any information to the prosecutor regarding a prospective juror that appellant wanted on the jury. Because appellant failed to show that the denial of his request for substitute counsel would impair his right to effective assistance, the court did not abuse its discretion in denying that request. (*Ibid.*)

The judgment is affirmed.

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PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

in question after speaking to the investigator, and was fairly certain that he was speaking to appellant and Brown at 6:05 p.m.

William R. Pounders, Judge

Superior Court County of Los Angeles

Jonathan P. Milberg, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant
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